Administrative Appeal Decision - Bailey, Rodney

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name:	Bailey, Rodney	**Facility:**	Eastern NY CF
NYSID:	02742180-Q	**Appeal Control No.:**	11-135-18 B
DIN:	81-A-1110		

Appearances: Martha Rayner Esq.
Lincoln Square Legal Services
Fordham University School of Law
150 West 62nd Street
9th Floor
New York, New York 10023

Decision appealed: November 2018 decision, denying discretionary release and imposing a hold of 24 months.

Board Member(s) who participated: Shapiro, Smith, Agostini

Papers considered: Appellant's Brief received March 27, 2019

Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

Records relied upon: Pre-Sentence Investigation Report, Parole Board Report, Interview Transcript, Parole Board Release Decision Notice (Form 9026), COMPAS instrument, Offender Case Plan.

Final Determination: The undersigned determine that the decision appealed is hereby:

_____ ___ **Affirmed** ___ **Vacated, remanded for de novo interview** ___ **Modified to** _____
Commissioner

_____ ___ **Affirmed** ___ **Vacated, remanded for de novo interview** ___ **Modified to** _____
Commissioner

_____ ✓ **Affirmed** ___ **Vacated, remanded for de novo interview** ___ **Modified to** _____
Commissioner

If the Final Determination is at variance with Findings and Recommendation of Appeals Unit, written reasons for the Parole Board's determination must be annexed hereto.

This Final Determination, the related Statement of the Appeals Unit's Findings and the separate findings of the Parole Board, if any, were mailed to the Inmate and the Inmate's Counsel, if any, on 6/28/19 GG.

Distribution: Appeals Unit – Appellant - Appellant's Counsel - Inst. Parole File - Central File
P-2002(B) (11/2018)

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APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant challenges the November 2018 determination of the Board, denying release and imposing a 24-month hold. Appellant's instant offense involved the appellant selling drugs, and when the police tried to arrest him, he shot a gun at the officer six times, which caused the policeman's death. 199 glassine envelopes of heroin were recovered. Appellant raises the following issues: 1) per 9 N.Y.C.R.R. 8000.5, the Board illegally withheld the inmate's timely request for the DA letter, community opposition letters, an unredacted COMPAS, and various medical/mental health/addiction treatment summaries. 2) appellant's counsel on appeal was granted access to the community opposition letters, but the names and addresses of the authors of the letters was illegally redacted. 3) DOCCS is still refusing to release the seperatee information list. 4) on appeal DOCCS did give appellant's counsel an unredacted COMPAS-meaning the unredacted COMPAS should have been originally given to the inmate prior to the interview. 5) the Board relied upon numerous pieces of erroneous information- specifically, he did not shoot the police officer six times, his criminal history did not begin in 1974, and there were no criminal convictions prior to 1977. And the unredacted COMPAS erroneously states he is probable for substance abuse, that he has no employment plans, and that he would have financial difficulties upon release. 6) the community opposition reflects penal philosophy, are from people with no personal knowledge of the case and in fact many may be from out of state. And some are identical- indicating the decision is a result of political pressure. 7) the Board failed to consider that there is a defense attorney letter. 8) DOCCS has sent conflicting information about whether a DA letter exists or not, but the Board says in the transcript it will consider it. 9) the Board failed to consider and/or properly weigh the required statutory factors. 10) the decision lacks detail. 11) the Board decision illegally resentenced him. 12) the Board failed to make required findings of fact to support the statutory standard cited. 13) a police officer's life is not considered to be more important than any other life. 14) the Board failed to comply with the 2011 amendments to the Executive Law in that they failed to give any reason for departing from the COMPAS, and the statutes are now forward based. 15) no aggravating factors exist. 16) the Parole Board Report has errors.

Discretionary release to parole is not to be granted "merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, **and** that his release is not incompatible with the welfare of society **and** will not so deprecate the seriousness of his crime as to undermine respect for the law." Executive Law § 259-i(2)(c)(A) (emphasis added); accord Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). Executive Law § 259-i(2)(c)(A) requires the Board to consider criteria which is relevant to the specific inmate, including, but not limited to, the inmate's institutional record and criminal behavior. People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983). While consideration of these factors is mandatory, "the ultimate

decision to parole a prisoner is discretionary." Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000). Thus, it is well settled that the weight to be accorded the requisite factors is solely within the Board's discretion. See, e.g., Matter of Delacruz v. Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); Matter of Hamilton, 119 A.D.3d at 1271, 990 N.Y.S.2d at 717; Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239, 657 N.Y.S.2d 415, 418 (1st Dept. 1997). The Board need not explicitly refer to each factor in its decision, nor give them equal weight. Matter of Betancourt v. Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017); Matter of LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

Although the Board placed emphasis on the crime (murder), the record reflects it also considered other appropriate factors and it was not required to place equal weight on each factor considered. Matter of Peralta v. New York State Bd. of Parole, 157 A.D.3d 1151, 69 N.Y.S.3d 885 (3d Dept. 2018); Matter of Arena v. New York State Dep't of Corr. & Cmty. Supervision, 156 A.D.3d 1101, 65 N.Y.S.3d 471 (3d Dept. 2017).

Although the Board placed particular emphasis on the nature of the crime (shooting of police officer), the Board considered other factors and was not required to give equal weight to or discuss each factor considered. Matter of Gordon v. Stanford, 148 A.D.3d 1502, 50 N.Y.S.3d 627 (3d Dept. 2017). The Board was not required to give each factor equal weight. and was entitled to place greater emphasis on the gravity of the crime (murder of police officer). Matter of Copeland v. New York State Bd. of Parole, 154 A.D.3d 1157, 63 N.Y.S.3d 548 (3d Dept. 2017). Instant offense involving police killing. Matter of Francis v. New York State Div. of Parole, 89 A.D.3d 1312, 1313, 934 N.Y.S.2d 514 (3d Dept. 2011); The Board could place greater emphasis on the serious nature of the crime that involved shooting a police officer. MacKenzie v Evans, 95 A.D.3d 1613, 945 N.Y.S.2d 471 (3d Dept. 2012).

The Board placing particular emphasis on the callous nature of the offense does not demonstrate irrationality bordering on impropriety. Olmosperez v Evans, 114 A.D.3d 1077, 980 N.Y.S.2d 845 (3d Dept. 2014); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239-40, 657 N.Y.S.2d 415, 418 (1st Dept. 1997).

The fact that the Board afforded greater weight to the inmate's criminal history, as opposed to other positive factors, does not render the denial of parole for that reason irrational or improper. Matter of Davis v. Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013); Matter of Lashway v. Evans, 110 A.D.3d 1417, 1418, 974 N.Y.S.2d 164, 165 (3d Dept. 2013); Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 550 N.Y.S.2d 204 (3d Dept. 1990).

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As for community opposition, the Board may receive and consider written communications from individuals, other than those specifically identified in Executive Law § 259-i(2)(c)(A), opposing an inmate's release to parole supervision. Matter of Applewhite v. New York State Bd. of Parole, 167 A.D.3d 1380, 91 N.Y.S.3d 308, 311 (3d Dept. 2018) ("Contrary to petitioner's contention, we do not find that [the Board's] consideration of certain unspecified 'consistent community opposition' to his parole release was outside the scope of the relevant statutory factors that may be taken into account in rendering a parole release determination"), appeal dismissed, 2019 N.Y. LEXIS 622 (Mar. 28, 2019); Matter of Clark v. New York Bd. of Parole, 166 A.D.3d 531, 89 N.Y.S.3d 134 (1st Dept. 2018) ("the Board permissibly considered letters in opposition to the parole application submitted by public officials and members of the community"); Matter of Grigger v. New York State Div. of Parole, 11 A.D.3d 850, 852–53, 783 N.Y.S.2d 689, 691 (3d Dept. 2004) (recognizing 259-i(2)(c)(A)(v)'s list is not the exclusive information the Board may consider and persons in addition to victims and their families may submit letters), lv. denied, 4 N.Y.3d 704, 792 N.Y.S.2d 1 (2005); see also Matter of Jordan v. Hammock, 86 A.D.2d 725, 447 N.Y.S.2d 44 (3d Dept. 1982) (letters from private citizens are protected and remain confidential).

The Board may consider the probable repercussions of the criminal's actions upon the victims' families. Bottom v New York State Board of Parole, 30 A.D.3d 657, 815 N.Y.S.2d 789 (3d Dept. 2006).

The Board may consider negative aspects of the COMPAS instrument. Matter of Espinal v. New York Bd. of Parole, 2019 NY Slip Op 04080, 2019 N.Y. App. Div. LEXIS 4057 (3d Dept. May 23, 2019) (COMPAS instrument yielded mixed results); Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017) (COMPAS instrument with mixed results including substance abuse relevant given use before crime); Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017) (low risk felony violence but probable risk for substance abuse alcohol related crimes); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016) (scores not uniformly low including family support), lv. denied, 29 N.Y.3d 901, 57 N.Y.S.3d 704 (2017).

That the Board "did not recite the precise statutory language of Executive Law § 259-i (2)(c)(A) in support of its conclusion to deny parole does not undermine its conclusion." Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 1142, 25 N.Y.S.3d 698 (3d Dept. 2016) (citation omitted); accord Matter of Reed v. Evans, 94 A.D.3d 1323, 942 N.Y.S.2d 387 (3d Dept. 2012). The language used by the Board was "only semantically different" from the statute. Matter of Miller v. New York State Div. of Parole, 72 A.D.3d 690, 691–92, 897 N.Y.S.2d 726, 727 (2d Dept. 2010); Matter of James v. Chairman of New York State Div. of Parole, 19 A.D.3d 857, 858, 796 N.Y.S.2d 735, 736 (3d Dept. 2005); see also People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983) (upholding decision that denied release as "contrary to the best interest of the community").

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The Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a), as it was sufficiently detailed to inform the inmate of the reasons for the denial of parole. Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 997, 82 N.Y.S.3d 240 (3d Dept. 2018); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435, 968 N.Y.S.2d 87 (1st Dept. 2013); Matter of Little v. Travis, 15 A.D.3d 698, 788 N.Y.S.2d 628 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742, 739 N.Y.S.2d 300 (3d Dept. 2002); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983).

Appellant's assertion that the denial of parole release amounted to an improper resentencing is without merit inasmuch as the Board fulfilled its obligation to determine the propriety of release per Executive Law § 259-i(2)(c)(A) and after considering the factors set forth therein. Executive Law § 259 et seq.; Penal Law § 70.40; Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011); Matter of Crews v. New York State Exec. Dept. Bd. of Parole Appeals Unit, 281 A.D.2d 672, 720 N.Y.S.2d 855 (3d Dept. 2001). The Board was vested with discretion to determine whether release was appropriate notwithstanding the minimum period of incarceration set by the Court. Matter of Burress v. Dennison, 37 A.D.3d 930, 829 N.Y.S.2d 283 (3d Dept. 2007); Matter of Cody v. Dennison, 33 A.D.3d 1141, 1142, 822 N.Y.S.2d 677 (3d Dept. 2006), lv. denied, 8 N.Y.3d 802, 830 N.Y.S.2d 698 (2007). The appellant has not in any manner been resentenced. Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 1142, 25 N.Y.S.3d 698 (3d Dept. 2016).

The Board may place greater weight on the nature of the crime without the existence of any aggravating factors. Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014).

The letter appellant claims is a defense attorney letter was considered by the Board. However, in terms of the Parole Board Report, it is not a defense attorney letter. It is a letter addressed from his former lawyer to the appellant himself, and there is no discussion of parole matters in it. The letter is not in response to a Parole Board inquiry, nor is it directed to the Parole Board. So while the letter was reviewed, it is not a formal defense lawyer letter as that term is used for parole purposes.

There is no letter from the District Attorney. The Parole Board Report is in error on that. And, the statement from the Commissioner in the interview transcript does not state there is such a letter, but rather only that if there is a letter it will be reviewed. An Inmate Status Report/Parole Board Report containing misinformation, if not used in the decision, will not lead to a reversal. Grune v Board of Parole, 41 A.D.3d 1014, 838 N.Y.S.2d 694 (3d Dept. 2007). An Inmate Status Report/Parole Board Report containing erroneous information, if not used in the decision, will not lead to a reversal of the parole denial. Restivo v New York State Board of Parole, 70 A.D.3d 1096, 895 N.Y.S.2d 555 (3d Dept. 2010).

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The Pre-sentence Investigation Report says the appellant shot the police officer six times. Pursuant to Executive Law sections 259-i(2)(c)(A) and 259-k(1), the Board is required to obtain official reports and may rely on the information contained therein. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 474, 477, 718 N.Y.S.2d 704, 706, 708 (2000) (discussing former status report); Matter of Carter v. Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept.) (presentence investigation report), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011); see also Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976). To the extent Appellant contends the Board relied on erroneous information in the pre-sentence report, this is not the proper forum to raise the issue. Any challenge to the pre-sentence report must be made to the original sentencing court. Matter of Delrosario v. Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016); Matter of Wisniewski v. Michalski., 114 A.D.3d 1188, 979 N.Y.S.2d 745 (4th Dept. 2014); Matter of Vigliotti v. State of New York, Executive Div. of Parole, 98 A.D.3d 789, 950 N.Y.S.2d 619 (3d Dept. 2012). The Board is mandated to consider the report and is entitled to rely on the information contained in the report. Executive Law § 259-i(2)(c)(A); 9 N.Y.C.R.R. § 8002.2(d)(7); Matter of Carter v. Evans, 81 A.D.3d 1031, 1031, 916 N.Y.S.2d 291, 293 (3d Dept.), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011).

As for errors in the criminal history, appellant did have a misdemeanor drug arrest in 1974, so his criminal history did begin in that year. The appellant does have a felony firearms conviction in 1978. So though the Board put down the wrong year by four years, that is a totally harmless error. And appellant does have drug and gambling convictions. There is a small error in the dates of the convictions, but that error is totally harmless. The misstatement of fact in the Board determination did not rise to a level where it affected the Board's decision, and as such any alleged error would be deemed harmless such that no new proceeding is required. Matter of Rossney v. New York State Division of Parole, 267 A.D.2d 648, 649, 699 N.Y.S.2d 319 (3d Dept 1999); Khatib v New York State Board of Parole, 118 A.D.3d 1207, 988 N.Y.S.2d 286 (3d Dept. 2014).

Appellant's counsel on appeal was erroneously given an unredacted COMPAS. In any event, there are no errors in it. The substance abuse score is graded by Equivant, the creator of the COMPAS procedures, and not by DOCCS.

There was no offer of any employment. There were letters from reentry task force agencies stating they would help appellant find interviews, but no promissory letters of employment. And the one letter appellant especially promotes is from a childhood friend, who doesn't state his position, claiming he will hire him at a company, but the letter is not on company letterhead. This is not a letter of commitment for employment. And given the appellant has been incarcerated since 1981, his job resume and actual employment skills in the post-prison world are clearly lacking.

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In the absence of a convincing demonstration that the Board did not consider the statutory factors, it must be presumed that the Board fulfilled its duty. Matter of Fuchino v. Herbert, 255 A.D.2d 914, 914, 680 N.Y.S.2d 389, 390 (4th Dept. 1998); Matter of McLain v. New York State Div. of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994); Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 945, 550 N.Y.S.2d 204, 205 (3d Dept. 1990); People ex rel. Herbert, 97 A.D.2d 128, 468 N.Y.S.2d 881.

As for the documents withheld from the inmate prior to his Board interview, the unredacted COMPAS was mistakenly given to appellant's counsel, as neither appellant nor his counsel are entitled to it. As for not releasing the community opposition letters, the request was made in August 2018, and the Clark decision wasn't issued until November 2018. So at the time of the inmate's request, the response from DOCCS was lawful. As for mental health/addiction records, should any contain opinions that appellant does not agree with, a safety issue within the facility would be created. So, withholding these documents is correct. And as for the seperatee list, this is a prison security list to keep apart specific inmates who are known to want to hurt each other. As this is an issue concerning maintaining jail security (which is self-evident), so that document likewise should not be released.

Neither appellant or his counsel is entitled to unredacted community opposition letters. The weight to be accorded to each letter is up to the Parole Board Commissioners. Appellant seeks to have all letters voided on the allegation they represent penal philosophy and political pressure. As for political pressure, see Krebs v. N.Y. State Div. of Parole, No. 9:08-CV-255NAMDEP, 2009 WL 2567779, at *12 (N.D.N.Y. Aug. 17, 2009) (public and political pressure "are permissible factors which parole officials may properly consider as they relate to 'whether 'release is not incompatible with the welfare of society and will not so deprecate the seriousness of the offense as to undermine respect for the law'"); Morel v. Thomas, No. 02 CV 9622 (HB), 2003 WL 21488017, at *5 (S.D.N.Y. June 26, 2003) (same); Seltzer v. Thomas, No. 03 CIV.00931 LTS FM, 2003 WL 21744084, at *4 (S.D.N.Y. July 29, 2003) (same).

As for the allegation that a community opposition letter might contain penal philosophy, which is prohibited, the Board is well aware of that but still may nonetheless read the letter. By way of analogy, victim impact statements may contain raw emotions of a close-knit family traumatized by a depraved and senseless murder. These submissions can also be emotional and touch upon inappropriate matters. Such fact does not require the Parole Board to expressly disavow in its decision inappropriate matters interjected by victims or to somehow quantify the extent or degree to which it considered appropriate parts of victim's statements while disregarding other parts in its overall analysis of the statutory factors. The Board's decision will be upheld if there is nothing indicating it was influenced by, placed weigh upon, or relied upon any improper matter. Duffy v New York State Department of Corrections and Community Supervision, 132 A.D.3d 1207, 19 N.Y.S.3d 610 (3d Dept. 2015).

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Mention must also be made the interpretation of the statute being urged by petitioner would violate the First Amendment to the Constitution. It is a binding principle that New York courts must avoid, if possible, interpreting a presumptively valid statute in such a manner that would needlessly render it to be unconstitutional. Alliance of American Insurers v Chu, 77 N.Y.2d 573, 585, 569 N.Y.S.364 (1991); Lavalle v Hayden, 98 N.Y.2d 155, 161, 746 N.Y.S.2d 125 (2002). Per the First Amendment, "Congress shall make no law ... prohibiting the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The right of petition found in the First Amendment is one of the freedoms protected by the Bills of Rights, and the courts cannot impute to the Legislature an intent to invade these freedoms. This philosophy governs the approach of groups of citizens to administrative agencies (which are both creatures of the legislature, and arms of the executive). Certainly the right to petition extends to all departments of the government. Calififornia Motor Transport Co. v Trucking Unlimited, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed2d 642 (1972). The courts should refrain from adopting such an unconstitutional interpretation. If the court were to adopt the approach advocated by petitioner, it is basically rendering the First Amendment as being meaningless by ordering the Parole Board not to entertain constitutionally authorized activity.

Appellant's claim that the Board failed to comply with the 2011 amendments to the Executive Law is rejected. Dolan v New York State Board of Parole, 122 A.D.3d 1058, 995 N.Y.S.2d 850 (3d Dept. 2014); Tran v Evans, 126 A.D.3d 1196, 3 N.Y.S.3d 633 (3d Dept. 2015); Boccadisi v Stanford, 133 A.D.3d 1169, 20 N.Y.S.3d 477 (3d Dept. 2015). Furthermore, the 2011 Executive Law amendments have been incorporated into the regulations adopted by the Board in 2017.

The Board decision cited the negative portion of the COMPAS. So, the Board did not depart from the COMPAS. The 2017 amended regulations don't create any substantive right to release, but rather, merely increase transparency in the final decision. Courts must defer to the Parole Board's interpretation of its own regulations so long as it is rational and not arbitrary nor capricious. Brown v Stanford, 163 A.D.3d 1337, 82 N.Y.S.3d 622 (3d Dept. 2018). the COMPAS is not predictive and was never intended to be the sole indicator of risk and needs as the Board gets risk and needs information from a variety of sources, including the statutory factors and the interview. Notably, the 2011 amendments did not eliminate the requirement that the Board conduct a case-by-case review of each inmate by considering the statutory factors including the instant offense. The amendments also did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole. Executive Law § 259-i(2)(c)(A). Thus, the COMPAS cannot mandate a particular result. Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016). Rather, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether the three standards are satisfied. See Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107, 1108, 990 N.Y.S.2d 295 (3d Dept. 2014); accord Matter of Dawes v.

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Annucci, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017). That is exactly what occurred here. Thus, the COMPAS instrument cannot mandate a particular result. Matter of King, 137 A.D.3d 1396, 26 N.Y.S.3d 815. Rather, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether all three statutory standards are satisfied. See Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107, 1108, 990 N.Y.S.2d 295 (3d Dept. 2014); accord Matter of Dawes v. Annucci, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017).

Contrary to Appellant's claim, the 2011 amendments and 9 NYCRR § 8002.2(a) as amended do not represent a forward-looking shift requiring the COMPAS to be the fundamental basis for release decisions. This proposition is not supported by the language of the statute itself, considering the relatively modest change to Section 259-c(4) and the absence of any substantive change to Section 259-i(2), which governs the discretionary release consideration process. In 2011, the Executive Law was amended to require procedures incorporating risk and needs principles to "assist" the Board in making parole release decisions. Executive Law § 259–c(4). The Board satisfies this requirement in part by using the COMPAS instrument. Matter of Montane v. Evans, 116 A.D.3d 197, 202, 981 N.Y.S.2d 866, 870 (3d Dept. 2014); see also Matter of Hawthorne v. Stanford, 135 A.D.3d 1036, 1042, 22 N.Y.S.3d 640, 645 (3d Dept. 2016); Matter of LeGeros, 139 A.D.3d 1068, 30 N.Y.S.3d 834; Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014).

Recommendation: Affirm.

STATE OF NEW YORK
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